

Current Status of California's 'Or Equal' Requirements

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California public agencies must allow the contractor on a public works project to provide an equal to materials, products, things, or services specified in the contract documents.

This "or-equal" requirement applies to every "agency of the state . . . political subdivision, municipal corporation, or district . . . [and] to any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works . . ." (Pub. Cont. Code § 3400). It assures the public of the lowest prices, prevents one product from getting a lock on a project, and encourages competition among equal products.

The Public Contract Code lays out the or-equal requirement and the procedures for its implementation. It also describes exceptional situations when the or-equal requirement may not apply. Case law explains what is and is not an equal.

An or-equal requirement has been California law since at least 1961 (former Gov. Code § 4380, added by Statutes of 1961, chapter 217, section 1). It has been incorporated into the two most widely used standard public works contracts, Caltrans' Standard Specifications (California Department of Transportation, 1999) section 6-1.05, and the "Greenbook," the Standard Specifications for Public Works Construction (BNi Publications, Inc., 2003) section 4-1.6.

The current statute is Public Contract Code § 3400 (almost identical language also appears in the State Contract Act, Pub. Cont. Code § 10129). The statute prohibits any public works project specifications from (1) limiting "the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words "or equal" so that bidders may furnish any equal material, product, thing, or service."

The specifications are supposed to call out the time period, before or after award, during which the contractor must submit "data substantiating a request for a substitution of 'an equal' item, [and,] [i]f no time period is specified, data may be submitted any time within 35 days after the award of the contract" (Pub. Cont. Code § 3400).

Obviously, 35 days is not sufficient time on large or complex projects, so the agency should specify more time, maybe even staggering several deadlines to correspond to the appearance of various subcontractors on the project. Nothing prevents an agency from accepting and considering or-equal submittals after the deadline; an agency should do so when the contractor based its bid on the or-equal price, because the agency is getting the benefit of that lower price. Although the statute allows an agency to demand or-equal submittals before award of the contract, doing so should be avoided. It raises the specter of award manipulation to avoid a legitimate or-equal - which defeats the express purposes

of both the or-equal requirement and the competitive bidding laws.

The goals of the or-equal requirement (“to widen the area of competition, and to bar local procurement officials from choosing a particular source either out of favoritism or because of an honest preference” [Jack Stone Co. v. United States (1965) 170 Ct. Cl. 281, 287, 344 F. 2d 370, 373-74]) are essentially the same as the reasons for requiring competitive bidding (“to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public” [Graydon v. Pasadena Redevelopment Agency (1980) 104 CA 3d 631, 636, 164 CR 56]). When these goals cannot be achieved, the competitive bidding or or-equal requirement is not enforced. In these situations, an agency may specify a particular product or a “sole source.”

Public Contract Code § 3400 now spells out those situations. As amended in 2003, and effective January 1, 2004, the statute allows sole sourcing for four reasons: (1) to conduct a field test or experiment of the product, (2) to match existing products in use on the particular public work, (3) to obtain a product that is only available from one source, and (4) to respond to an emergency. However, before an agency can resort to sole sourcing for one of these reasons, the awarding authority or its designee (e.g., the city engineer) must make a finding that one of the four reasons applies. Further, that finding must be described in the invitation for bids or request for proposals.

So, beginning January 1, 2004, bidders should check invitations for bids and requests for proposals for a justification for the sole sourcing of any material, product, thing, or service specified in contract documents. If no justification appears, the agency must accept equals.

The 2003 amendment to the or-equal law (Statutes of 2003, chapter 233, section 3) explains that the four reasons for allowing sole sourcing “are intended to codify, and not to change the application of, existing California case law.” That case law pertains to competitive bidding requirements, and allows exceptions to competitive bidding “where it has appeared that competitive bidding would be incongruous or would not result in any advantage to the public entity in efforts to contract for the greatest public benefit. . . . [for example, where] the governmental entity has entered into contracts for personal services depending upon a peculiar skill or ability [citations]; contracts for the purchase of patented products [citations]; contracts for the provision of services or the construction of public improvements by a government regulated monopoly [citations]; contracts for experimental or unique products and/or services [citations]; and actions or contracts for the acquisition or disposition of property for a particular use and with a special value to one person [citations]” (Graydon v. Pasadena Redevelopment Agency (1980) 104 CA 3d 631, 636-37, 164 CR 56).

The criteria for determining when a product is equal to what was specified have been established by case law. Functionality is the basic test of equality. State and federal courts have no difficulty enforcing the or-equal requirement, usually by making the agency pay the difference in cost between the specified product that the contractor was compelled to

provide and the equal product that the contractor offered to provide.

For example, in *Argo Constr. Co. v. County of Los Angeles* (1969) 271 CA2d 54, 76 CR 361, the contractor sued the county for the difference in cost between the movable metal partitions which the contractor had proposed as an equal and the specified partitions which the county made him install. The proposed partition did not have single line joints and did not extend all the way to the floor with continuous thickness as did the specified brand. The county claimed that “it, just as any other owner, is entitled to insist that the construction satisfy its aesthetic requirements.” But the court rejected that argument and awarded damages to the contractor. The court held that “if aesthetics were permitted to rule the choice, [what is now Pub. Cont. Code § 3400] would in most cases be dead letter.” The county was ordered to pay the difference between the specified product and the offered equal.

Another example is *Sherwin Electric Service v. United States* (1971) 193 Ct. Cl. 962, 436 F2d 992, where the contract involved an emergency electrical system at the Veterans Hospital in Fresno. Only one manufacturer’s automatic transfer switch could meet the specifications. The government had refused to permit the contractor to use the product which the contractor had submitted as an equal to the specified switch.

The court, first, held that the use of such a proprietary specification amounts to the same thing as specifying that product by its brand name. Then the court stated the legal test for determining what is an equal: “Whether the substitute functions as well, in all essential respects, as the specified equipment.”

After analyzing the two types of switches, the court concluded that the switch proposed by the contractor should have been accepted as an “equal,” as it “would have proved as effective and as durable in the performance of the contract work as the ASCO switch described in the specifications.” Again, the government was ordered to pay the difference between the specified product and the offered equal.